Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

October Term 1977

NO. 77-1038

John S. Stewart — *Petitioner*

V.

United States of America — *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INDEX


| | Page |
|---|---|
| Opinions Below | 1 |
| Jurisdiction | 2 |
| Questions Presented | 2 |
| Constitutional Provisions and Statutes Involved | 4 |
| Statement of the Case | 7 |
| Reasons Why the Court Should Grant the Writ | 17 |
| 1. The Decision of the Court of Appeals Creates A Burden on Financial Institutions Which Congress Did Not Intend and Which is Contrary to Decisions of Other Courts of Appeals | 17 |
| 2. The Court of Appeals Has Authorized Unwarranted Imposition of Criminal Liability for Violation of Non-Penal Federal Regulations | 21 |
| 3. By Sustaining Petitioner's Conviction, the Court of Appeals Allows the Government to Establish Falsity in a Criminal Case by Evidence that Does Not Remove Reasonable Doubt | 23 |

Index Continued


| APPENDIX | Page |
|---|---|
| Fourth Circuit's Opinion November 1, 1977 ..... | A-1 |
| Fourth Circuit's Order Denying Rehearing December 22, 1977 ..... | A-10 |
| 18 U.S.C. § 2 (1970) ..... | A-11 |
| 18 U.S.C. § 371 (1970) ..... | A-11 |
| 18 U.S.C. § 657 (1970) ..... | A-11 |


TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| Bruton v. United States, 391 U.S. 123, 885, Ct. 1620, 20 L.Ed.2d 476 (1968) ..... | 32, 35 |
| Friedman v. United States, 374 F.2d 363 (8th Cir. 1967).. | 26 |
| Freidus v. United States, 223 F.2d 598 (D.C. Cir 1955).. | 25, 26 |
| Hudson v. North Carolina 363 U.S. 697, 80 S.Ct. 1314, 4 L.Ed.2d 1500 (1960) ..... | 35 |
| Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964) ..... | 32 |
| Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 169, 90 L.Ed. 1557 (1946) ..... | 30, 32 |

Page

Morissette v. United States,
342 U.S. 246, 72 S. Ct. 240,
96 L.Ed. 288 (1952) ..... 36

Schaffer v. United States,
362 U.S. 511, 80 S.Ct. 945,
4 L.Ed. 2d 921 (1960) .....30, 31, 32

United States v. Blumberg,
258 F. Supp. 885 (D. Del.
1966)..... 25

United States v. Docherty
468 F.2d 989(2d Cir. 1972)... 20

United States v. Gens,
493 F.2d 216 (1st Cir. 1974).. 20

United States v. Murdock,
290 U.S. 389, 54 S. Ct. 223,
78 L.Ed. 381 (1933)..... 36

United States v. Riley,
550 F.2d 233 (5th Cir.1977)... 37

United States v. Snider,
502 F.2d 645 (4th Cir. 1974).. 25

In re Winship,
397 U.S. 358, 364, 90 S. Ct.
1068, 1073, 25 L. Ed. 2d
368, 375 (1970) ..... 23, 25

CONSTITUTIONAL PROVISIONS:

Fifth Amendment, U. S.
Constitution ..... 4, 23

Sixth Amendment, U. S.
Constitution ..... 4, 32, 35





Page

STATUTES:

18 U.S.C. § 2 ..... 3,6,10,15,27,28

18 U.S.C. § 371 ..... 6, 7,22

18 U.S.C. § 656 ..... 19

18 U.S.C. § 657 ..... 6, 7,19

18 U.S.C. § 1005 ..... 19,27

18 U.S.C. § 1006 ...3,5,7,10,23,26,27

18 U.S.C. § 1621 ..... 26

28 U.S.C. § 1254(1) ..... 2

FEDERAL RULES:

Federal Rules of Criminal Procedure,
Rule 8 ..... 29

Rule 29 ..... 17

Rule 30 .....36,37

Rule 33 .....17,31

Federal Rules of Evidence,
Rule 801 .....30,32

MISCELLANEOUS:

Jackson, The Federal Prosecutor,
31 J. Crim. L. & Crimin. 3,5
(1940) ..... 33

Index Continued

4. The Decision of the Court of Appeals Eliminated Elements of Proof Required by Two Federal Criminal Statutes ..... 26

5. The Decision of the Court of Appeals to Uphold the Denial of a New Trial for Petitioner Has the Effect of Encouraging Abuse of the Power of Federal Prosecutors, Misuse of Conspiracy Charges, and Convictions Resulting from Transference of Guilt .. 29

6. In Allowing the Jury to Consider Pleas of Guilty by Petitioner's Co-defendants As Evidence of His Own Guilt, the Decision of the Court of Appeals Was in Conflict with Decisions of this Court and Sanctioned a Departure from the Accepted and Usual Course of Judicial Proceedings ..... 34

7. The Court of Appeals Allowed the Elimination of Good Faith as a Defense to Crimes Involving Criminal Intent, Despite Contrary Decisions of This Court and of Other Courts of Appeal .. 36

Conclusion ..... 38



IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-

JOHN S. STEWART,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

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PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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This petition for a writ of certiorari seeks review of a decision of the Court of Appeals for the Fourth Circuit, which affirmed petitioner's conviction in the District Court for the Middle District of North Carolina.

## OPINIONS BELOW

A panel of the Court of Appeals for the Fourth Circuit heard argument on July 13, 1977; and on November 1, 1977 they rendered their opinion, which is unpublished. Circuit Judges Winter and Butzner joined in the per curiam opinion of the majority; and Senior Circuit Judge Bryan filed a dissenting

opinion. On December 22, 1977, a petition for rehearing and suggestion for rehearing en banc were denied without opinion. The original opinion and the denial of the petition for rehearing are reproduced in the Appendix to this Petition at A-1 & A-10 . No opinion was delivered in the District Court.

## JURISDICTION

The decision of the panel of the Court of Appeals was entered on November 1, 1977. The decision denying the petition for rehearing and suggestion for rehearing en banc was entered on December 22, 1977. This petition is timely filed within 30 days of the denial of rehearing. Jurisdiction to review this case is conferred on the Court by 28 U.S.C. § 1254(1)(1970).

## QUESTIONS PRESENTED

1. Did the Court of Appeals erroneously accept the government's contention that making a "straw loan" establishes an intent to defraud?

2. Did the Court of Appeals erroneously base affirmance on a misinterpretation of the regulations of the Federal Home Loan Bank Board?

3. Does prosecution for a "false" entry or statement require proof that the entry or statement cannot be reasonably construed in a manner consistent



with its truthfulness?

18 4. Does federal prosecution under ~~18~~ U.S.C. § 1006 require proof that a "false entry" is material?

5. Did the Court of Appeals affirm petitioner's conviction because it misconstrued 18 U.S.C. § 2(b), which allows punishment as a principal for "willfully" causing an act to be done by another?

6. Since the trial judge conditionally admitted extensive prejudicial evidence against petitioner, over his objection, on grounds that the evidence was admissible if the jury should find that a conspiracy existed, should the petitioner's motion for a new trial have been granted when the jury acquitted him of conspiracy?

7. Is it prejudicial error for a trial judge, over objection, to admit evidence that a codefendant has plead guilty to the same charge?

8. Since there was evidence that petitioner acted in good faith, was he entitled, upon proper request, to have the jury instructed how the evidence of good faith related to allegations of intent to defraud?

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

### United States Constitution

### AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.



### 18 U.S.C. § 1006 (1970):

Whoever, being an officer, agent or employee of or connected in any capacity with the Reconstruction Finance Corporation, Federal Deposit Insurance Corporation, National Credit Union Administration, Home Owners' Loan Corporation, Farm Credit Administration, Department of Housing and Urban Development, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, or any land bank, intermediate credit bank, bank for cooperatives or any lending, mortgage, insurance, credit or savings and loan corporation or association authorized or acting under the laws of the United States or any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation or by the Administrator of the National Credit Union Administration, or any small business investment company, with intent to defraud any such institution or any other company, body politic or corporate, or any individual, or to deceive any officer, auditor, examiner or agent of any such institution or of department or agency of the United States, makes any false entry in any book, report or statement of or to any such institution, or without being duly authorized, draws any order or bill of exchange, makes any acceptance, or issues, puts forth or assigns any note, debenture, bond or other obligation, or draft, bill of exchange,

mortgage, judgment, or decree or, with intent to defraud the United States or any agency thereof, or any corporation, institution, or association referred to in this section, participates or shares in or receives directly or indirectly any money, profit, property, or benefits through any transaction, loan, commission, contract, or any other act of any such corporation, institution, or association, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 2 (1970); 18 U.S.C. § 371 (1970); and 18 U.S.C. § 657 (1970) are reproduced in the Appendix hereto at A-11.



## STATEMENT OF THE CASE

From July, 1935, until his conviction in October, 1976, petitioner John S. Stewart was the president of Mutual Savings and Loan Association, in Durham, North Carolina. Under his leadership this pioneer black-managed financial institution grew from $213,000 to over $14,000,000. Petitioner also was president of the American Savings and Loan League, for sixteen years was a member of the Durham City Council, and served as Major Pro Tem of that City. In short, he has been one of the most prominent black leaders in North Carolina.

Even so, petitioner now stands under the shadow of a judgment of the District Court, entered on December 6, 1976, which imposed an active sentence of three years imprisonment and a $10,000 fine. He seeks review of the decision by the Court of Appeals which affirmed this judgment.

Petitioner was adjudged guilty on Counts Sixteen and Seventeen of a seventeen-count indictment, charging six defendants with various violations of 18 U.S.C. §§ 371, 657, and 1006. Three other counts against petitioner were dismissed -- Count Nine, upon his motion before the jury was selected, and Counts One and Ten, pursuant to a jury verdict of not guilty.

The indictment had been returned on August 2, 1976. A week later four co-defendants, Walter A. Biggs, C. Paul Roberts, C. Thomas Biggs, and

Thomas Upchurch, were arraigned thereon; and, pursuant to plea-bargaining, each tendered a plea of guilty on one count of the indictment. On August 16, 1976, petitioner and the remaining co-defendant, Walter Dozier, were arraigned together and entered pleas of not guilty. Petitioner moved for severance of his trial, relief from misjoinder, and dismissal of Counts Sixteen and Seventeen -- the two charges of which he was subsequently convicted. The government did not oppose the severance of trials, which was granted; the other motions were denied.

Co-defendant Dozier's case was called first for trial by the United States Attorney and began in Greensboro, North Carolina, on September 20, 1976. Four days later the jury returned a verdict of guilty on all counts alleging offenses by this co-defendant. On September 20, 1976, petitioner's trial commenced.

Before jury selection took place, petitioner moved to dismiss Count Nine for legal insufficiency and for failure to give notice that he was charged with an offense thereunder. After this motion was granted, trial proceeded on Counts One, Ten, Sixteen and Seventeen. Count One alleged a wide-ranging conspiracy of all six defendants extending from July 27, 1972 until January 21, 1975 to commit these offenses against the United States: (a) misapplication of the funds of Home Savings and Loan Association and



Mutual Savings and Loan Association; (b) causing loans to be made at these two federally-insured associations from which defendants benefitted; (c) causing false entries and statements to be made upon the records and reports of the two associations to defraud the associations and deceive examiners of the Federal Home Loan Bank Board (hereinafter "FHLBB"); and (d) "to defraud the United States of its rights to have the laws pertaining to the regulations of Savings and Loan Associations insured by the Federal Savings and Loan Insurance Corporation administered honestly, fairly, and free from corruption, deceit, craft and trickery".

Count Ten charged that petitioner, as president and director of Mutual Savings and Loan Association, and C. Paul Roberts, a developer, had fraudulently participated in making seven loans at Mutual to Walter A. Biggs, Upchurch, and C. Thomas Biggs, although they knew the proceeds of the loans would be used to develop an apartment house complex in which Stewart was financially interested.

Count Sixteen stated that Stewart, the president of Mutual, and defendant Upchurch, "with intent to injure said Association and to deceive examiners of the Federal Home Loan Bank Board, a regulatory agency of the United States, did make and cause to be made false entries and statements upon the records and reports of Mutual Savings

and Loan Association in that an affidavit filed with said Association relative to Loans Numbered 980569, 980565, and 980568 of Thomas C. Upchurch, in which Thomas C. Upchurch attested to the fact that he was the contractor for property being developed by himself, whereas in truth and fact, as John S. Stewart and Thomas C. Upchurch well knew, the contractor for said development was C. Paul Roberts; in violation of Title 18, United States Code, Sections 1006 and 2". This Count is closely paralleled by Count Seventeen, which charges that Stewart and C. Thomas Biggs made false entries in an affidavit filed with Mutual Savings relative to two other loans, which attested that Biggs was the contractor, although Stewart and Biggs knew that the contractor was Roberts.

According to the evidence, C. Paul Roberts, a major developer in Durham, North Carolina, commenced action early in 1972 to develop housing primarily for blacks on a large tract of land located in southeast Durham. Part of this land was rezoned to permit its development for fourplexes -- buildings each located on a separate lot and containing four apartments. In accord with Roberts' development plan, Homeco, Inc., a service corporation wholly owned by Home Savings and Loan Association, acquired title to land on which Roberts proposed to build thirty-four of these fourplexes. Walter A. Biggs was the president of Home Sav-



ings and Loan; his son, C. Thomas Biggs, a Durham attorney, was a director of that Association.

The government offered evidence that C. Paul Roberts, and corporations in which he owned a substantial interest, had borrowed heavily over the years from Home Savings and from Mutual Savings. Regulations of the Federal Home Loan Bank Board limit the amount of loans that a federally-insured savings and loan association can make to a single borrower; and by the winter of 1973 Roberts had apparently reached his borrowing limit at each association.

Roberts then located various investors, who would borrow funds with which to construct the thirty-four fourplexes. All of the buildings were to have the same basic design; all were to be built by Roberts or one of his corporations. Home Savings undertook to make loans for twenty-seven fourplexes, each loan being a combined construction and permanent loan in the amount of $32,000. Five of these loans were to a family cor--oration in which petitioner had an interest; two loans were made to other officers of Mutual Savings. Mutual made loans for construction of the seven fourplexes not financed by Home Savings. Five loans were to Thomas Upchurch, a vice-president and director of Home Savings. The other two loans were to Durham Rental and Investment Company, a family corporation owned by Walter A. Biggs and his son, C. Thomas Biggs.

The thirty-four loan files -- twenty-seven from Home Savings and seven from Mutual -- were received in evidence. Each loan had been made in April 1973. Each of the loan files from Home Savings contained a construction contract between the borrower in whose name the loan was made and Dexall Builders, a corporation in which C. Paul Roberts had a substantial interest. Roberts himself signed each of these contracts as an officer of Dexall Builders.

None of the seven loan files from Mutual contained a contract whereby a builder agreed to construct for the named borrower the fourplex which was the subject of the loan. There was no evidence that any contract had ever been executed for the construction of these seven fourplexes. However, it was understood that Roberts, or one of his corporations, would build these fourplexes along with the twenty-seven being financed by Home Savings.

Counts Sixteen and Seventeen concern only the seven loans made by Mutual Savings. For each of these loans, when the final disbursement of loan proceeds was made to the named borrower, Mutual received a certificate that all bills had been paid for the construction which Mutual was financing. The certificate was made on a mimeographed, uncaptioned "in-house" form used by Mutual. The form contained separate blanks for execution by the "Owner" and the "Contractor". There was no evidence that any certi-



ficate was false in its representation that all bills connected with construction of the fourplexes had been paid before the certificate was executed.

Although Upchurch executed two of these Mutual forms only on the line provided for signature by the "Owner", he executed three of them not only on that line but also on the line provided for signature by the "Contractor". According to the government, this constituted a misrepresentation that Upchurch was the "Contractor", when C. Paul Roberts was actually the "Contractor". This "false entry" was the basis for Count Sixteen.

For each of the two loans to his family corporation, C. Thomas Biggs had executed the form as a corporate officer on the line provided for signature by the "Owner". The family corporation, Durham Rental and Investment Company, was the named borrower to which the final disbursement of loan proceeds was being made. C. Thomas Biggs also executed the form individually on the line provided for signature by the "Contractor", and Count Sixteen charged this as a misrepresentation that he was the contractor, when Roberts was really the contractor.[1]

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1. The government's own evidence established that during the summer of 1974, before any

The uncontradicted evidence was that petitioner had nothing to do with preparation of the forms, which are the subject of Counts Sixteen and Seventeen and were executed by Upchurch and C. Thomas Biggs. However, the government contended that (a) petitioner had initially represented Mutual Savings in considering the loan applications from Upchurch and Biggs, (b) at that time he had not wished the records of Mutual to reflect that Roberts would be building the fourplexes which Mutual was financing, [2] and (c) therefore he did not require that the borrowers furnish to Mutual a construction contract with their builder -- namely, Dexall Builders, in which Roberts had a substantial

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Footnote 1 continued:
of the forms were executed, Roberts had suffered financial reverses and had stopped all work on the fourplexes. C. Thomas Biggs had undertaken supervision of the various subcontractors who were working on the thirty-four fourplexes; and in many ways he had become the "contractor" prior to the execution of any of the forms involved in Counts Sixteen and Seventeen.

2. In November 1973, almost a year before the forms were executed, petitioner had told an FHLBB examiner that Dexall Builders was constructing the fourplexes.



interest. Since there was no construction contract in the file, the form for disbursement of the final loan proceeds was prepared at Mutual to be executed by Upchurch and Biggs on the "Contractor's" line. The ultimate result, according to the government's rationale, was that Upchurch and Biggs each misrepresented that he was a "Contractor"; and since this resulted from petitioner's acts at the inception of the loan, he "wilfully caused" the misrepresentation and so was a principal under 18 U.S.C. § 2.

In its case, the government relied heavily on circumstantial evidence. This included not only the details of all thirty-four loans on the fourplexes but also of other loan transactions involving Paul Roberts, which had occurred in 1972 before there was any showing of involvement by petitioner. Highly prejudicial evidence was admitted by the trial judge conditionally on the ground that it concerned statements of co-conspirators. He reaffirmed this view in his jury charge.

During the presentation of defense evidence, a defense witness was asked on cross-examination whether defendants Thomas Upchurch and Walter Biggs had tendered pleas of guilty to the indictment. Over defense objection, the witness was allowed to answer this question in the affirmative. The court gave no limiting instructions; and so the jury was free

to consider as evidence of petitioner's guilt the fact that his co-defendants had entered pleas of guilty.

Both through cross-examination and direct evidence, petitioner sought to establish that he had acted in good faith with respect to any FHLBB regulation concerning loans to one borrower. Also, he offered evidence that it was not uncommon for a borrower to certify both as "owner" and as "contractor" that all bills for construction had been paid. [3] In line with this evidence, petitioner submitted detailed requests for instructions concerning good faith as a defense to the charges against him. Among these were requests for instructions that similar innocent transactions were relevant as to the existence of intent to deceive or defraud and that good faith could exist even if petitioner had made an unreasonable mistake concerning the interpretation of applicable state or federal regulations. At the end of the jury charge, petitioner's counsel brought to the trial judge's attention his failure to deal with good faith; but the court declined to give further instructions.

After the jury returned its verdict, petitioner renewed his motion

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3. This practice was customary if the loan file contained no construction contract.



under Federal Rule 29 of Criminal Procedure for acquittal on Counts Sixteen and Seventeen. Also, he moved for a new trial under Federal Rule 33. When these motions were denied and the active sentence of three years imprisonment was imposed, petitioner appealed to the Court of Appeals.

## REASONS WHY THE COURT SHOULD GRANT THE WRIT

1. The Decision of the Court of Appeals Creates A Burden on Financial Institutions Which Congress Did Not Intend and Which Is Contrary to Decisions of Other Courts of Appeals. The central premise of the prosecution was that C. Paul Roberts had over-extended his credit with Home Savings and Mutual Savings and so that the defendants had agreed that, instead of making loans to Roberts, named borrowers would be located who would borrow money from the two associations to construct thirty-four fourplexes in southeast Durham. Since in this way the defendants intended to avoid FHLBB regulations which limit loans to one borrower by a federally-insured savings and loan association, they possessed the intent to defraud those associations.

In his dissent Senior Circuit Judge Bryan points out that the government has misinterpreted the FHLBB's loans-to-one-borrower

regulation, which does not concern itself with the loans that an association may have made to a builder who contracts to build for the named borrower. [4]

According to Judge Bryan, acquiescence in this misconstruction of the regulation "would mean that the officers of every association, such as Mutual, before making a housing loan will be duty bound to pass upon the credit of every builder with whom its borrower desired to contract". This "duty" -- enforced here by criminal prosecution -- has significant implications nationally both as to lending practices and the availability of credit for housing construction.

The affirmance by the Court of Appeals has even broader implications for financial institutions. The government's position was that the thirty-four loans for construction of fourplexes were "straw loans" for the benefit of C. Paul Roberts, who, be-

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4. The FHLBB may well have shared Senior Circuit Judge Bryan's view since neither that regulatory agency nor the State authorities of North Carolina, which had chartered Mutual Savings, attempted to halt petitioner from performing his duties as president until he was convicted in October 1976.



cause of the loans-to-one-borrower regulation could not borrow in his own right. Under this view, the intent to make this "straw loan"--through which the named borrowers pledged their credit in order to make funds available for Roberts to construct the fourplexes -- constituted the intent to defraud the associations, which all of the defendants were alleged to have possessed.

The government's interpretation of intent to defraud -- accepted by the District Court and acquiesced in by the Court of Appeals -- imposes criminal penalties on a savings and loan officer who approves a loan to a named borrower knowing that the loan proceeds will be used to benefit some third person who could not borrow funds in his own right. In addition, the named borrower becomes criminally liable as an aider and abettor. Since the statutes which govern federally-insured savings and loan associations, 18 U.S.C. §§ 657 and 1006, are paralleled by statutes applicable to banks which are members of the Federal Reserve, 18 U.S.C. §§ 656 and 1005, the view adopted in the case at hand is important not only for most of the nation's savings and loan associations but also for most of its banks. Because of the large number of potential lenders for which the government's

interpretation will limit the loans they can extend, the availability of credit to borrowers is also significantly affected.

Heretofore, the Courts of Appeal faced with the issue have refused to extend criminal liability in the manner for which the government has successfully contended in the present case. In United States v. Gens, 493 F.2d 216(1st Cir. 1974) and United States v. Docherty, 468 F.2d 989(2d Cir. 1972), there was considered the criminal liability of bank officers for making "straw loans". Under the interpretation given in those cases of the circumstances in which a "straw loan" evidences intent to defraud, the government clearly failed to establish criminal liability in the case at hand.[5] The seeming conflict of opinion between the Courts of Appeal for the First Circuit and the Second Circuit, on the one hand, and the Fourth Circuit on the other hand -- a conflict as to a matter important to the national lending community-- is additional reason for granting the writ in the present case.

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5. Those cases were not cited by the Court of Appeals in the case at hand.



2. The Court of Appeals Has Authorized Unwarranted Imposition of Criminal Liability for Violation of Non-Penal Federal Regulations. By allowing petitioner's conviction to stand, the Court of Appeals upheld the government's effort to enforce criminal liability for violation of a federal regulation. As Senior Circuit Judge Bryan, in his dissent, noted, the government's view "may be permissible in a civil case, but certainly not as a premise for imprisonment for crime". Because of the proliferating and all-pervasive regulations of federal agencies, it becomes important for this Honorable Court to curb unwarranted extensions of federal criminal jurisdiction for alleged violations of federal regulations not purporting to have penal sanctions.

The regulations of the Federal Home Loan Bank Board do not themselves authorize criminal punishment. They are enforced by that regulatory agency through various administrative procedures, such as cease-and-desist orders. However, in the case at hand, the government sought to transmute alleged violations of those regulations into violation of federal criminal statutes. In the first place, intent to violate the regulations was equated to intent to defraud -- the mens rea requisite for conviction of any of the charges against petitioner and his co-defendants.

Secondly, in setting forth the objects of the conspiracy charged in Count One of the indictment, the government charged a purpose of the defendants to "defraud the United States of its right to have the laws pertaining to the regulation of" federally-insured associations administered honestly; [6] and then it proceeded on the premise that this purpose was proved by evidence that the defendants intended to evade a regulation of the Federal Home Loan Bank Board.

The indictment of petitioner and his conviction are predicated upon attributing to non-penal federal regulations an effect which they were never intended to have. Such misuse of federal regulatory authority extends federal criminal jurisdiction -- and the workload of the federal courts -- into areas never intended by Congress. At the same time, it provides

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6. The wording of 18 U.S.C. §371 suggests strongly that Congress intended that, to be punishable, a conspiracy must have as its object an offense for which criminal punishment is itself prescribed by federal statute. Since petitioner was acquitted of the conspiracy count (Count One), this issue is not raised directly in the case at hand.



federal prosecutors and regulators with an ominous weapon for harassment and persecution. The writ should be granted to permit review of the acquiescence by the Court of Appeals in this unwarranted effort of the government to base federal criminal liability on the violation of non-penal regulations.

3. By Sustaining Petitioner's Conviction, the Court of Appeals Allows the Government to Establish Falsity in a Criminal Case by Evidence that Does Not Remove Reasonable Doubt.

Falsity is an element of 18 U.S.C § 1006, just as it is for many other offenses prescribed by Title 18. In a state court this Court has held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged". In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073, 25 L. Ed.2d 368, 375(1970). Presumably the Due Process Clause of the Fifth Amendment gives similar protection to an accused in a federal criminal case.

In the case at hand, the petitioner was found guilty of willfully causing his co-defendants, Thomas Upchurch and C. Thomas Biggs, to make false entries in the records of Mutual Savings and Loan Associ-

ation. Obviously petitioner could not be guilty if the entries were not false. On their face, the alleged "false entries" are susceptible to at least two interpretations. The one on which the government relies is that Upchurch and Biggs, by signing on the contractor's line, represented that they were "contractors" for the project. The other interpretation is that, in signing the Mutual form on both the line for "Owner" and on that designated for "Contractor", they represented only that any bills connected with the construction had been paid. This representation, of course, was true.

The second interpretation in many ways seems the more proper, since a person cannot "contract" with himself; and so, when co-defendant Upchurch signed as both the "owner" and "contractor", he could hardly be viewed as representing that he was the "contractor" in the usual sense of that word. Also supporting the second interpretation is the circumstance that there were no construction contracts in the Mutual loan files, and none was shown to have existed.

The Court of Appeals left it to the jury to decide between the conflicting interpretations these entries attested. In so doing, the Court rejected decisions that have



manifested reluctance to impose criminal liability for affirmtions that were ambiguous. Cf. United States v. Blumberg, 258 F. Supp. 885 (D. Del. 1966); Freidus v. United States, 223 F. 2d 598 (D.C. Cir. 1955); United States v. Snider, 502 F. 2d 645 (4th Cir. 1974).

The issue of federal law involved is an important one since it concerns enforcement of the requirement of proof beyond a reasonable doubt -- a requirement which is part of the constitutional right to due process, as affirmed by In re Winship, supra. To allow a jury to convict for a "false" statement when an appellate court can discern that -- on its face or in the particular context -- the statement was ambiguous and, under one plausible interpretation, was not untrue, is to allow conviction on evidence that does not remove reasonable doubt. Since many federal prosecutions are predicated on allegedly false statements or entries, the issue is a recurrent one that should be decided by this Court and not left to the Courts of Appeal to apply their individual standards of appellate review.

4. The Decision of the Court of Appeals Eliminated Elements of Proof Required by Two Federal Criminal Statutes. Counts Sixteen and Seventeen, of which petitioner was convicted, did not charge that the misstatement of the identity of the contractor was material. The trial court did not instruct the jury that the entry need be material; and the evidence shows that there was no reason why or how the identity of the "contractor" was material. 18 U.S.C. § 1006 does not expressly require that a false entry be material; and apparently neither the trial court nor the Court of Appeals concluded that materiality was a requisite for conviction.

In dealing with other federal criminal statutes that punish false statements, Courts of Appeal have ruled that only material false statements fell within the statutory prohibition. Freidus v. United States, 223 F.2d 598 (D.C. Cir. 1955). A comparison of the punishment authorized under 18 U.S.C. § 1006 with that provided under 18 U.S.C. § 1621 -- which requires proof of materiality for conviction of perjury -- suggests that materiality is also demanded under the former statute, Cf. Friedman v. United States, 374 F.2d 363(8th Cir. 1967).

Although 18 U.S.C. § 1006 is a statute that has not been frequently invoked in the past, the identical issue as to materiality is presented by 18 U.S.C. § 1005 -- its statutory twin, which applies to banks that are members of the Federal Reserve. Furthermore, there exists the generic issue of whether materiality should be implied as an element of the offense in those federal criminal statutes proscribing false statements but not specifying that materiality of the false statement must be proved. Thus, the case at bar presents an important question of federal law which has not been, but should be, settled by this Court.

Not only did the affirmance of petitioner's conviction by the Court of Appeals serve to eliminate an element of the offense implicit in 18 U.S.C. § 1006, but also it removed an element expressly required by 18 U.S.C. § 2. Since the false entries which were the subject of Counts Sixteen and Seventeen had not been made by petitioner, the government proceeded against him in these counts on a theory that he had caused the making of the entries and that therefore 18 U.S.C. § 2 made him liable as a principal.

The government's contention was that in April 1973, when petitioner approved the seven loans made by Mutual, he had not

required the named borrowers to furnish Mutual with executed construction contracts. In this way, the involvement of Roberts in the project as the builder would not be apparent from the Mutual files. Moreover, under the standard loan-processing procedure employed by Mutual, it was foreseeable that, when the final disbursement of loan proceeds was made, the payment of bills would be certified by the borrowers as if they were the owners. According to this rationale, petitioner "caused" the making of the false entries.

Some might question whether this chain of causation would suffice to impose civil liability. In any event, to view it as sufficient to establish criminal liability pursuant to 18 U.S.C. § 2 is to ignore the requirement of willfulness in that statute. Guidance is needed from this Court on whether federal prosecutors can impose criminal liability pursuant to 18 U.S.C. § 2 by showing that a particular result might have been foreseen by an accused even though he never intended or desired that result.



5. The Decision of the Court of Appeals to Uphold the Denial of a New Trial for Petitioner Has the Effect of Encouraging Abuse of the Power of Federal Prosecutors, Misuse of Conspiracy Charges, and Convictions Resulting from Transference of Guilt.

In seeking to predicate criminal liability on the alleged violation of federal regulations, the government sought to expand the arsenal of weapons available to federal prosecutors. However, the government also relied here on the time-honored weapon of a conspiracy charge. [7]

Conspiracy charges have long been popular with prosecutors -- federal and state. Such a charge facilitates joinder of offenses and of defendants under Federal Rule 8 of Criminal Procedure; sometimes it allows wide choice of venue. Also, it tends to promote the liberal reception of

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7. The conspiracy count also was to some extent an innovation since it charged that one of the objects of the conspiracy was the violation of laws for the regulation of federally-insured savings and loan associations; and the government and trial judge apparently viewed this to encompass an agreement to violate FHLBB regulations.

circumstantial evidence to establish the existence of a conspiracy. And the presence of a conspiracy may render admissible evidence which otherwise would be excluded as hearsay. Federal Rule of Evidence 801(d)(2).

However, the use of a conspiracy charge may be attended with a risk of confusion and "transference of guilt". Cf. Kotteakos v. United States, 328 U.S. 750, 66 S. Ct. 169, 90 L. Ed. 1557(1946). Even though affirming in Schaffer v. United States, 362 U.S. 511, 80 S. Ct. 945, 4 L. Ed. 2d 921 (1960), the Court recognized that a defendant brought to trial on a multi-count indictment containing a conspiracy count might be prejudiced as to the other charges if the evidence was insufficient to sustain the conspiracy charge.

The case at hand illustrates perfectly the risk of prejudice and transference of guilt with which Kotteakos and Schaffer were concerned. The massive record of trial contains extensive evidence of possible wrongdoing by other persons, of which petitioner could have had no knowledge; this evidence was admitted only by reason of the conspiracy charge. Prejudicial evidence which otherwise would have been excluded as hearsay was received by the trial court under the provision of Federal Rule of Evidence 801 concerning statements by co-conspirators.



Some of the evidence was expressly admitted by the trial judge on a conditional basis, the jury being instructed that they should not consider the evidence unless they found that a conspiracy existed.

When the jury acquitted petitioner of the conspiracy charge, he moved for a new trial under Federal Rule 33 of Criminal Procedure.[8] The motion was denied; and the Court of Appeals affirmed on the ground that a jury may render an inconsistent verdict.

In so doing, the Court of Appeals overlooked the thrust of petitioner's argument and of the decisions of this Court. A new trial was not required because acquittal on Counts One and Ten was inconsistent with conviction of petitioner on the subsidiary charges contained in Count Sixteen and Seventeen -- even though such inconsistency probably existed. Instead, a new trial was required because petitioner's acquittal undercut the express basis for the admission of a substantial amount of damaging

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8. In so doing, petitioner sought relief that, as was emphasized by the majority in Schaffer v. United States, supra, had not been sought in that case.

evidence concerning the statements and misdeeds of other persons.

Under the principles of Kotteakos and Schaffer the trial judge had a continuing duty to avoid prejudice to petitioner from transference of guilt -- prejudice from a jury's concluding that, because petitioner had transactions with other persons who committed misdeeds, he must be guilty of something himself. Although the trial judge did instruct the jury that certain evidence could only be considered if they found that a conspiracy existed, such an instruction was as inadequate to protect the defendant as were the instructions by the trial court in Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed.2d 476(1968) and Jackson v. Denno, 378 U.S. 368, 84 S. Ct. 1774, 12 L.Ed.2 908(1964). Indeed, the issue here is very similar to that in Bruton since, under authority of Federal Rule of Evidence 801, the trial court admitted statements of alleged co-conspirators whom petitioner did not have an opportunity to cross-examine, as contemplated by the Sixth Amendment right of confrontation; when the jury acquitted petitioner of conspiracy, there was destroyed any basis for jury consideration of these statements.

Under such circumstances the only effective means to avoid pre-



judice to a defendant from transference of guilt and jury consideration of inadmissible evidence is to grant a new trial. Because conspiracy prosecutions are commonplace, it is important that the applicable principles be clearly defined by this Court. Decades ago Justice Jackson observed:

"If the prosecutor is obliged to choose his cases, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him. It is in this realm -- in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies."
(Jackson, The Federal Prosecutor, 31 J. Crim. L. & Crimin. 3, 5 (1940).

Charges of conspiracy have traditionally lent themselves to such abuses by prosecutors. Just as in the case at hand, they present the jury with a mass of confusing evidence, tending to induce the conclusion that where there is such a quantity of evidence the accused must be guilty of some offense. Similarly, they present appellate courts with voluminous and complex records of trial with the concomitant temptation to conclude that any errors in the trial were not reversible.

To deter overreaching by prosecutors and prejudice to defendants, it is important that this Court now clarify and reaffirm the responsibility of a trial judge to grant a defense motion for a new trial when a defendant is acquitted of a conspiracy charge which has been the basis for admission of substantial prosecution evidence.

6. In Allowing The Jury to Consider Pleas of Guilty by Petitioner's Co-defendants As Evidence of His Own Guilt, the Decision of the Court of Appeals Was in Conflict with Decisions of this Court and Sanctioned a Departure from the Accepted and Usual Course of Judicial Proceedings.
Over defense objection, the prosecution was allowed to present evidence that two of petitioner's



co-defendants had tendered pleas of guilty to the same indictment. This evidence, which was not adduced from the co-defendants themselves, was not limited in effect by instructions from the trial court. Thus the jury was free to infer that, since the two co-defendants plead guilty to the same indictment, which included charges that they had conspired with the petitioner and had committed joint offenses with him, then he also must be guilty.

As Bruton v. United States, supra, makes clear, a defendant's right of confrontation is violated when the statement of a co-defendant is admitted against him -- even if limited by instructions to the jury. In this context, a plea of guilty by a co-defendant, entered earlier during arraignment on the same indictment and not limited by instructions to the jury, is equally prejudicial to the petitioner. The misleading effect is heightened, since the plea by the co-defendants in the case at bar -- as so often occurs -- was the result of plea-bargaining; and yet the petitioner had no opportunity to show why and under what circumstances their plea of guilty had been entered. In Hudson v. North Carolina, 363 U.S. 697, 80 S.Ct. 1314, 4 L.Ed.2d 1500(1960), the Court made clear in a state case the prejudicial effect of evidence of a plea of guilty by a co-defendant. It is

equally as prejudicial in a federal criminal trial! To allow such evidence as the basis for a jury finding of guilt is in such clear conflict with the decisions of this Court -- and is so great a departure from the usual course of judicial proceedings -- that review should be granted.

7. The Court of Appeals Allowed the Elimination of Good Faith as a Defense to Crimes Involving Criminal Intent, Despite Contrary Decisions of This Court and of Other Courts of Appeal.

In criminal cases involving fraudulent intent or mens rea, this Court has ruled that it is reversible error to refuse a requested instruction concerning good faith. United States v. Murdock, 290 U.S. 389, 54 S. Ct. 223, 78 L. Ed. 381 (1933). In Morissette v. United States, 342 U.S. 246, 72 S. Ct. 240, 96 L. Ed. 288(1952), it was held that even a mistake of law could negate felonious intent.

Pursuant to Federal Rule 30 of Criminal Procedure, petitioner presented written requests for instructions predicated on Murdock and on Morissette. They were refused. Also, as to Counts Sixteen and Seventeen -- of which he was convicted -- petitioner requested instructions that evidence of innocent transactions conducted in the same manner



could be considered by the jury as to fraudulent intent.[9]

This request, which the trial judge also did not grant, seems authorized by the ruling in United States v. Riley, 550 F.2d 233(5th Cir. 1977), which reversed a conviction because evidence was excluded of similar innocent transactions. If it is reversible error to exclude such evidence, it would also appear prejudicial for a trial judge to decline to instruct a jury concerning the relevance of such evidence when it has been admitted.

It is important for the Court to reaffirm here that such instructions concerning good faith should be given upon request when, as in this case, they are applicable to the facts. It is equally important that the Court not allow erosion of a defendant's right under Federal Rule 30 to request, and have granted, instructions which will allow the jury to consider not only the evidence that tends to convict but also that which tends to acquit.

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9. The request related specifically to evidence that it was customary for a named borrower to sign a loan disbursement form both as "owner" and "contractor".

## CONCLUSION

The very complexity of this case makes it difficult to explain concisely the questions which are presented for review and the reasons why a writ of certiorari should be granted. Indeed, that complexity may have induced the majority in the Court of Appeals to write only a short per curiam opinion, rather than attempt to respond to the convincing arguments in the dissenting opinion of Senior Circuit Judge Bryan.

The case involves much more than the fate of an outstanding black leader with no prior blemish on his record and who, according to the opinion of the able and experienced dissenting judge in the Court of Appeals, has been found guilty of offenses for which there was no evidence. Indeed, the record raises several important issues -- each of which is entitled to review in its own right, rather than to be brushed aside because the case is complicated and multi-faceted.

These issues concern the scope of the federal criminal jurisdiction which Congress intended to authorize as to savings and loan associations and banks; the criminal responsibility for certain widespread lending practices which heretofore have been considered lawful; and the extent to which federal criminal jurisdiction can be expanded by non-penal regulations of federal agencies like the Federal Home Loan Bank Board. They also concern the proper judicial treatment of crimes involving falsity and mens rea and



the appropriate procedure to be employed in conspiracy trials. And they involve the correctness of lower court rulings which have deprived petitioner of fundamental procedural safeguards safeguarded by previous decisions of this Court.

Although the questions presented by this record are numerous, they are important and merit decision now by this Court. For the foregoing reasons a writ of certiorari should be granted.

Respectfully submitted,

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January, 1978

CERTIFICATE OF SERVICE

I certify that, pursuant to Supreme Court Rule 33, I have served the foregoing Petition for a Writ of Certiorari to the Court of Appeals for the Fourth Circuit by mailing three copies, first class postage prepaid, to the Solicitor General, Department of Justice, Washington, D. C., 20530, and three copies to the Honorable H. M. Michaux, Jr., United States Attorney, at his office address, Box 1858, Greensboro, N. C. 27402.

This 21st day of January, 1978.

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Petitioner Stewart



APPENDIX TO PETITION

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 77-1109

United States of America,
Appellee,

versus

John S. Stewart,
Appellant.

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Appeal from the United States District Court for the Middle District of North Carolina, at Durham. Eugene A. Gordon, Chief Judge.

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Argued July 13, 1977
Decided November 1, 1977

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Before BRYAN, Senior Circuit Judge; WINTER and BUTZNER, Circuit Judges.

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Robinson O. Everett (William G. Pearson, II, on brief) for Appellant; N. Carlton Tilley, Jr. and Allen H. Gwyn, Assistant United States Attorneys (Benjamin H. White, Jr., on brief) for Appellee.

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PER CURIAM:

Named with others in a seventeen-count indictment, defendant, John S. Stewart, was granted a severance of his trial on the four counts in which he was named. He was convicted by a jury of two charges of making and causing to be made false entries and statements upon the records of a savings and loan association, the deposits of which were insured by the Federal Savings and Loan Insurance Corporation (18 U.S.C. §§ 1006 and 2), and acquitted of defrauding said association and of conspiracy to commit the various substantive offenses (18 U.S.C. §§ 371, 1006 and 2). He appeals, but we see no merit in his appeal and affirm the judgment entered by the district court. *

Stewart initially contends that the evidence was insufficient to establish his guilt. We disagree. There was ample testimony from which the jury could infer that Stewart, an officer of the savings and loan association, deliberately caused false contractors' affidavits to be entered in the loan files of the association. There was also ample testimony to establish the materiality of such entries

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* In United States v. Dozier, No. 77-1108, (decided August 1, 1977) (unreported), we affirmed the convictions of Stewart's only co-defendant who also went to trial. Four other defendants pleaded guilty.



and to establish that these were made with intent to defraud or deceive the institution or federal officials. In short, the elements of two violations of 18 U.S.C. § 1006 were amply proved.

Stewart next contends that he was the victim of a prejudicial misjoinder. Specifically, he objects to being tried on the conspiracy count, as well as the two substantive offenses charged in a single trial. We find no merit in the claim. First, Stewart did not request a severance as to the counts in which he was charged. He can prevail only if the failure to sever the trial of them was plain error. Second, we can find no plain error. Stewart's principal claim of prejudice is that certain evidence, admissible only as to the conspiracy count, may have been relied on by the jury in convicting him of the substantive counts. We are not persuaded. It seems to us that most, if not all, of the evidence connected with the conspiracy count would have been admissible in a separate rial on the two substantive counts.

Stewart's remaining contentions require little discussion. Although the jury acquitted Stewart of fraud and conspiracy while convicting him of making false entries, the inconsistency between verdicts is not a ground for retrial. Likewise, we find no reversible error in the handling of certain evidentiary questions, the district court's charge, the sentence imposed, or the completely unsubstantiated effects of pretrial

publicity.

A F F I R M E D.

ALBERT V. BRYAN, Senior Circuit Judge, dissenting:

As a matter of law, the conviction of appellant Stewart is in my view without evidential support. Even accepting as true all of the proof adduced by the prosecution, the facts established thereby and on which the sentence was passed under 18 U.S.C. 1006, did not make out a case. * My point is that

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*As pertinent, §1006 reads:

"Whoever, being an officer, agent, or employee of or connected in any capacity with *** any lending, mortgage, insurance, credit or savings and loan corporation or association authorized or acting under the laws of the United States ***with intent to defraud any such institution *** or to deceive any officer, auditor, examiner or agent of any such institution or of department or agency of the United States, makes any false entry in any book, report or statement of or to any such institution, or *** with intent to defraud the United Szates or any agency thereof, or any corporation, institution, or association referred to in this section,



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* Footnote continued:

participates or shares in or receives directly or indirectly any money, *** or benefits through any transaction, loan, commission, contract, or any other act of any such corporation, institution, or association, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

the portion of this statute on which the indictment relies does not encompass the misconduct proved of Stewart.

To begin with, the two counts (16 and 17) on which Stewart as an officer and director of Mutual, the insured loan association here, was convicted accused him of making, abetting in the making of, and causing to be made false entries and statements on the records and reports of Mutual, "with intent to injure and defraud" the association and "to deceive examiners of the Federal Home Loan Bank Board", the regulatory agency. He did not make the entries or statements but was said to be well aware of them as they appeared in certain affidavits of co-defendants Upchurch and Biggs filed with the association. The fraud, deception and falsity imputed to the appellant Stewart and the affiants rest solely on a regulation of the Bank Board in the frame of these facts:

The regulation prohibited such an association from lending to a single borrower funds exceeding the lesser amount of either the association's net worth or ten per cent of its assets. One C. Paul Roberts, in truth the actual building contractor for the dwelling-houses respectively owned by co-defendants Upchurch and Biggs had, at all times now relevant, outstanding borrowings from Mutual of far more than this limit. Upchurch and Biggs had procured loans in their personal or corporate names from Mutual, in



order to provide moneys for Roberts for this construction. The affidavits were false, inasmuch as they stated that Upchurch and Biggs were the contractors when, in truth, Roberts was the contractor. Appellant Stewart knew that Roberts, not the affiants, was the contractor, but he did not so inform Mutual. By these means it is said that Stewart, while an officer of Mutual, deceived it as well as the Government agency, the Board.

The majority now concludes that the result was to allow Roberts additional credit illegally, and further that thereby he abetted Upchurch and Biggs in violating the regulation and, hence, also the statute § 1006. This conclusion of guilt cannot be accepted because its major premise fails. The regulation did not apply to Roberts, for he was not the borrower, either de facto or de jure, while such status was a sine qua non of Stewart's guilt. To bridge this gap, he is in effect made a borrower constructively. This may be permissible in a civil case, but certainly not as a premise for imprisonment for crime.

Severe rigidity in the application of the indictment to the actualities of his conduct is further demanded by these indisputable factors: (1) Stewart was acquitted under the same indictment, count 1, of a conspiracy with Upchurch and Biggs to defraud the association by false entries and statements, and to "misapply and cause to be misapplied .....

to the use of C. Paul Roberts .... the monies, funds and credits" of Mutual; and (2) he was acquitted of count 10, charging under the same statute that he did unlawfully "participate" in the making of loans on the same properties included in the two counts on which he was convicted.

Plainly, the regulation governs only the relationship between the association and its obligor. Neither Upchurch, nor Biggs, nor Stewart could in the circumstances have possibly converted Roberts into a borrower. Likewise, no amount of abetting by Stewart could cast Roberts as a borrower. This role was indispensable to a verdict that Stewart was guilty of a breach of the regulation.

Indeed, Roberts had no obligation whatsoever in respect to the borrowings of Upchurch or Biggs. The loans did not by a jot increase the credit previously allowed Roberts. If the notes were not paid, Mutual had no claim on him; its sole recourse was against the makers. It is not irrelevant to pose this query: if Mutual had failed at any time to make advancements on the loans would Roberts have had recourse against Mutual, assuming he had suffered losses in consequence? The obvious negative answer vouches the soundness of the present argument.

To construe the regulation, as does the Government now, would mean that the officers of every association, such as Mutual, before making



a housing loan will be duty bound to pass upon the credit of every builder with whom its borrower desired to contract. Of course, this was not the regulation's purpose; its sole aim was to guard against overlending by the institution to a single borrower.

I would not allow the conviction to stand.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 77-1109

United States of America,

Appellee,

versus

John S. Stewart,

Appellant.

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ORDER

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The appellant's petition for rehearing and suggestion for rehearing en banc has been submitted to the court. A poll of the court was requested, and the suggestion for rehearing en banc lost for lack of a sufficient number of votes by the judges entitled to vote in the poll.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing and suggestion for rehearing en banc are denied.

Entered at the direction of Judge Winter for a panel consisting of Judge Bryan, Judge Winter, and Judge Butzner.

For the Court

(Signed) William K. Slate II

Filed 12-22-77 Clerk



18 U.S.C. § 2 (1970):

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 371 (1970):

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. § 657 (1970):

Whoever, being an officer, agent or employee of or connected in any capacity with the Reconstruction Finance Corporation, Federal Deposit Insurance Corporation, Home Owners'

Loan Corporation, Farm Credit Administration, Department of Housing and Urban Development, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, or any land bank, intermediate credit bank, bank for cooperatives or any lending, mortgage, insurance, credit or savings and loan corporation or association authorized or acting under the laws of the United States or any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, or any small business investment company, and whoever, being a receiver of any such institution, or agent or employee of the receiver, embezzles, abstracts, purloins or willfully misapplies any moneys, funds, credits, securities or other things of value belonging to such institution, or pledged or otherwise intrusted to its care, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount or value embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Supreme Court, U. S.
FILED
MAR 29 1978
MICHAEL RODAK, JR., CLERK

No. 77-1038

# In the Supreme Court of the United States

OCTOBER TERM, 1977

JOHN S. STEWART, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
*Solicitor General,*

BENJAMIN R. CIVILETTI,
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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is not reported.

### JURISDICTION

The judgment of the court of appeals was entered on November 1, 1977. A petition for rehearing was denied on December 22, 1977. The petition for a writ of certiorari was filed on January 21, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTIONS PRESENTED

1. Whether the evidence was sufficient to sustain petitioner's conviction.

2. Whether the trial court erred by allowing the government on cross-examination to ask a defense witness whether two co-defendants had pleaded guilty to charges in the indictment.

3. Whether the trial court erred in refusing to give certain instructions.

4. Whether the trial court erred in denying petitioner's motion for a new trial after the jury had acquitted him on the conspiracy charge.

## STATEMENT

Following a jury trial in the United States District Court for the Middle District of North Carolina, petitioner was convicted of two counts of violating 18 U.S.C. 1006 and 2 by making and causing false entries and statements to be made upon the records of a savings and loan association insured by the Federal Savings and Loan Insurance Corporation.[1] He was sentenced to three years' imprisonment on one count and two years' imprisonment on the second, the sentences to run concurrently, and fined $10,000 (Pet. 7). The court of appeals affirmed, one judge dissenting (Pet. App. A1-A9).

The evidence showed that one of petitioner's co-defendants,[2] C. Paul Roberts, a land developer and general contractor, had exceeded the loan limit for one borrower at Mutual Savings and Loan Association of

[1]Petitioner was acquitted of defrauding the savings and loan association and of conspiracy (Pet. 7).

[2]Petitioner was one of six defendants charged in a 17 count indictment. This Court denied certiorari in a case involving one of the other defendants named in the indictment. *Dozier* v. *United States*, No. 77-522, certiorari denied, February 21, 1978.



Durham, North Carolina (the Association).[3] Roberts desired additional funds to finance the development of certain property on which he planned to build apartments. In order to obtain loans that would have been unavailable to him if he approached the Association directly, Roberts arranged for Thomas C. Upchurch, an officer of the Home Savings and Loan Association,[4] and C. Thomas Biggs to obtain loans from the Association, in their own names, to finance the construction of several of the units (Ext. Tr. 18-19, 130-131).

Three of the Upchurch loan files at the Association included contractors' affidavits—signed by Thomas C. Upchurch both as the owner and as the contractor—stating that there were no unpaid bills. Upchurch testified that he had signed the affidavits as contractor on instructions from petitioner, although at no time during the construction of the apartment units was he actually the contractor. Petitioner told Upchurch that this was the procedure followed by the Association, and that the affidavits were needed for the Association's files (Ext. Tr. 40-42, 100-101).

Similarly in the two Biggs loan files there were contractors' affidavits—signed by C. Thomas Biggs as both owner and contractor (Ext. Tr. 133). Yet at no time

[3]A Federal Home Loan Bank Board regulation prohibits an insured association from lending any one borrower funds exceeding the lesser amount of either ten percent of the association's withdrawable savings or the full amount of its loss reserves and surplus (Tr. 370-371). As of June 26, 1973 the limit at the Association was approximately $1,070,000 (Tr. 371-372). As of the same date, Association loans to C. Paul Roberts and his interests amounted to approximately $1,825,000 (Tr. 373).

[4]Roberts was also ineligible to borrow any substantial amounts of money from Home Savings and Loan (Ext. Tr. 17-18). "Ext. Tr." refers to the separately paginated portion of the trial transcript captioned "Extracted testimony * * * and Jury Charge."

during the construction of these apartment units was Biggs the contractor (Ext. Tr. 135). When Biggs signed one of the affidavits in the offices of the Association, his name had already been typed in under the space for his signature as the contractor (Ext. Tr. 134-135).

Petitioner, who was the president of the Association, was aware that Roberts (not Upchurch or Biggs) was the contractor for the project.[5]

## ARGUMENT

1. a. Resting in large measure on the dissenting opinion below (Pet. App. A4-A9), petitioner contends that the government failed to prove his intent to defraud and that in essence he was convicted merely of violating a banking regulation (Pet. 17-23).

This contention ignores the central fact that petitioner was prosecuted, tried, and convicted for violating Section 1006, which makes it a crime intentionally to make a false entry in the records of a federally insured savings and loan association with the intent to defraud the association or to deceive its officers. He was not convicted of violating a federal banking regulation.[6] The government's evidence showed that petitioner caused affidavits executed by Upchurch and Biggs—which he knew to be untrue—to

[5]Petitioner was thoroughly familiar with Roberts' development, and indeed had arranged for his own family corporation to take out loans from Home Savings and Loan to develop five of the units (Tr. 965-975, 1029).

[6]Indeed the court charged the jury that although there had been testimony "about possible violations by various persons and institutions of said regulations of the Federal Home Loan Bank Board and state regulations" that "a violation of any of these regulations would not be in itself a crime; but a violation may be considered by you on the element of intent" (Ext. Tr. 343-344).



be entered into the Association's files.[7] Those affidavits falsely identified Upchurch and Biggs as contractors and thereby concealed the connection between the loan and the real contractor—who had far exceeded the maximum lending limit at the Association.

There was, moreover, ample evidence from which the jury could have inferred that petitioner acted with the intent to deceive or defraud. A director of the Association testified that he would not have approved a loan to Roberts in excess of the lending limit and that the directors relied upon petitioner (and the other Association officers) to tell them when the limit had been reached (Tr. 359-360). There was also evidence that petitioner concealed from federal examiners Roberts' involvement in the projects for which the Upchurch and Biggs loans were made (Tr. 438-439, 389-390). Finally, there was evidence that, contrary to petitioner's own strict policy, the loan files in question did not contain a copy of the Roberts construction contract (Tr. 394, 974).[8]

b. Petitioner further contends (Pet. 23-25) that the alleged false entries are susceptible to an innocent interpretation, and thus the jury was permitted to convict

[7]Contrary to petitioner's contention (Pet. 27-28) he was properly convicted of aiding and abetting the making of the false entries, since he supervised the loans, and he knowingly caused the entry of the affidavits into the Association's records.

[8]Petitioner's suggestion (Pet. 20) that the court of appeals' decision conflicts with *United States* v. *Gens*, 493 F. 2d 216 (C.A. 1), and *United States* v. *Docherty*, 468 F. 2d 989 (C.A. 2), is without merit. *Gens* is completely inapposite, since it involved a charge of willful misapplication in violation of 18 U.S.C. 656, not making a false entry. In *Docherty*, the court found no false entry on the bank's records where the defendant did not disclose the fact that he intended to give the loan proceeds to another when he recorded and accepted the loans as his own liability. The defendant in *Docherty* made no false statement analogous to the false identification here of the contractor.

on evidence that did not establish his guilt beyond a reasonable doubt. Whether or not an entry is false is a factual issue to be decided by the jury in the light of the relevant circumstances. *United States* v. *Biggerstaff*, 383 F. 2d 675, 679 (C.A. 4). In the instant case, where the contractors' affidavits were signed by persons who were not in fact contractors, there was sufficient evidence to support the jury's findings that the signatures were false entries, which petitioner then caused to be placed in the Association's loan files.

2. Petitioner urges (Pet. 34-36) that the trial court erred in allowing the government to elicit testimony that two of petitioner's co-defendants had pleaded guilty to charges in the same indictment, and in giving no limiting instruction. The relevant facts refute this claim.

Three of petitioner's co-defendants pleaded guilty and testified for the government at petitioner's trial. On direct examination petitioner's counsel asked a defense witness whether he knew the reputations of two of the co-defendants (Upchurch and Biggs) (Tr. 878). The witness responded that "Their reputations were excellent, and I think still are" (Tr. 879). On cross-examination, for impeachment purposes, government counsel asked the witness if he was aware that Upchurch and Biggs pleaded guilty to the indictment (Tr. 880). The trial court overruled petitioner's objection and permitted cross-examination to bring out that aspect of the witness' knowledge (Tr. 879-880). Petitioner contends (Pet. 34-35) that the introduction of this testimony might have permitted the jury to speculate that if Upchurch and Biggs were guilty, then petitioner too must be guilty. The trial court, however, carefully instructed the jury not to draw such an inference (Ext. Tr. 351-352):



> It has, of course, been brought out in the evidence that a defendant named in the indictment entered a plea or has entered a plea to certain of the charges contained in the indictment against him; but the disposition of the case against such defendant who has entered the plea must not be considered by you in determining the guilt or innocence of the defendant in this case except as it might have some bearing on the credibility of a witness.

Evidence of a co-defendant's guilty plea or conviction is not admissible to prove the defendant's guilt, but it is admissible for purposes of impeachment or to attack a witness' credibility, although the trial judge should give a cautionary instruction. *United States* v. *Bryza*, 522 F. 2d 414 (C.A. 7), certiorari denied, 426 U.S. 912. Moreover, even the improper admission of such evidence is not reversible error if it is not unduly emphasized and a cautionary instruction is given. *United States* v. *Newman*, 490 F. 2d 139, 143 (C.A. 3).[9]

3. Petitioner's assertions of errors in the instructions are also without merit.

a. Petitioner contends (Pet. 26-27) that the trial court erred by failing to instruct the jury that the false entry need be material. The complete answer is that the

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[9]Petitioner's reliance on *Bruton* v. *United States*, 391 U.S. 123, is misplaced. That case involved not a single reference to the fact that two co-defendants had pled guilty, but rather "the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, [were] deliberately spread before the jury in a joint trial." *Id.* at 135-136. *Hudson* v. *North Carolina*, 363 U.S. 697, is also distinguishable, since it involved a co-defendant's midtrial guilty plea before the jury in a joint trial. In those circumstances, the Court found that the potential prejudice to petitioner required professional assistance, and that petitioner's conviction, without benefit of counsel, violated due process.

prohibitions in 18 U.S.C. 1005 and 1006 against false entries in the records of federally insured banks and savings and loan associations apply to any false entries made with the intent to deceive, and materiality is not a requirement. See *United States* v. *Beer*, 518 F. 2d 168, 172-173 (C.A. 5).[10]

b. Petitioner argues (Pet. 36-37) that the trial court erred in refusing several requested instructions concerning good faith. Petitioner ignores the fact, however, that the trial court's instructions regarding willfulness, knowledge, and specific intent to defraud or deceive emphasized the good faith defense. The trial court instructed the jury that in order to convict petitioner they must find that the acts charged were "done voluntarily and purposely and not because of mistake or accident nor of an innocent reason," and "voluntarily and with knowledge that it was prohibited by law and with the purpose of violating the law and not by mistake, accident or in good faith" (Ext. Tr. 332). The court also charged the jury that they must find petitioner had specific intent to defraud (Ext. Tr. 335-337, 341). Since the central elements of petitioner's tendered instruction were contained in the instructions actually given, that was no error. *United States* v. *Pugh*, 509 F. 2d 766 (C.A. 8); *United States* v. *Nance*, 502 F. 2d 615, 619 (C.A. 8), certiorari denied, 420 U.S. 926.[11]

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[10]Petitioner relies (Pet. 26) on *Freidus* v. *United States*, 223 F. 2d 598 (C.A.D.C.), and *Friedman* v. *United States*, 374 F. 2d 363 (C.A. 8), but these cases involved 18 U.S.C. 1001. Unlike Sections 1005 and 1006, which apply to the maker of any statement intended to deceive, Section 1001 has been construed more narrowly. See *United States* v. *Beer*, *supra*, 518 F. 2d at 172-173.

[11]Petitioner specifically complains (Pet. 36-37) that the trial court refused to instruct the jury that evidence of innocent transactions conducted in the same manner could be considered as relevant to his intent. In fact, the trial court instructed the jury that "[e]vidence of similar transactions * * * may be considered by you in determining the intent of the defendant * * *" (Ext. Tr. 344).



4. Finally, there is no merit to petitioner's contention (Pet. 29-34) that he was entitled to a new trial on the substantive charges against him after the jury acquitted him of the conspiracy charge. Petitioner urges that the jury's verdict could have been improperly influenced by consideration of evidence admitted in connection with the conspiracy count. But as petitioner recognizes (Pet. 31), the trial court instructed the jury that they could consider this evidence only if they found that a conspiracy existed and that petitioner was one of its members (Ext. Tr. 330). The jury acquitted petitioner on two counts—including the conspiracy count—and there is no reason to believe that they disregarded their instructions.

## CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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